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"A" ITEM NOTE

From:	General Secretariat of the Council
To:	Council
No. prev. doc.:	6452/16
Subject:	Future of the Code of Conduct (Business taxation) - Council conclusions = Adoption

I. Background

1. The Code of Conduct (Business Taxation) on harmful tax competition (adopted in 1997) essentially sets out criteria for assessing harmful tax measures, which are subject to a voluntary peer-reviewed standstill and rollback commitment. The task of implementing the Code of Conduct is undertaken in the Code of Conduct Group (Business taxation) set up through the Council conclusions of 9 March 1998 (doc. 6619/98) which further detailed its governance.

2. In addition to its usual work on harmful tax measures, in 2008 the Council agreed the Future Work Package of the Group consisting of the following work streams: anti-abuse, transparency and exchange of information in the area of transfer pricing, administrative practices, and links to third countries.

3. In 2011 and 2015, the Group agreed new Work Packages which build on work continued from the 2008 work package and contains new topics in particular (1) addressing potentially harmful tax planning by multinationals through the use of special tax regimes for investment funds; (2) consolidating, per type of regime, various case-by-case assessments into general guidance or application notes for future use and (3) monitoring the implementation of agreed guidance.

II. <u>Future of the Code of Conduct</u>

4. The European Council conclusions of 23 May 2013 stressed the importance to continue work within the EU on the elimination of harmful tax measures and called for strengthening the Code of Conduct (EUCO 75/1/13 REV 1).

5. A discussion was held during the Latvian Presidency on the scope and the governance of the Group, on the basis of various proposals from Member States and the Commission which were discussed in the Code of Conduct group.

6. The HLWP welcomed in June 2015 that the Code of Conduct Group will continue work on this issue in July 2015, focusing on: a) making better use of the existing mandate of the Code; b) examining the possibilities to extend the mandate and to update the criteria; and c) the possible need to adjust the governance of the Code of Conduct accordingly. The ECOFIN Council endorsed this approach on 19 June 2015.

7. The ECOFIN Council adopted conclusions on the future of the Code of Conduct (doc. 15148/15) on 8 December 2015, which completed the first phase of this reform. They invited notably the HLWP to "*discuss a revision to the mandate in relation to the concept that profits are subject, as appropriate, to an effective level of tax within the EU, notwithstanding the competencies of Member States in the area of taxation*" and to "*conclude on the need to enhance the overall governance, transparency and working methods and to finalise the reform of the Group during the Dutch Presidency*".

8. In its roadmap setting out future work in the Council during the coming months in the field of Base Erosion and Profit Shifting (BEPS) (doc. 6039/16), the Netherlands Presidency indicated that work on the future of the Code of Conduct should be done at short term in a two-step approach:

– as a first step to discuss the governance, transparency and working methods of the Group;

– as a second step, to start discussions on a revision to the mandate in relation to the concept that profits are subject, as appropriate, to an effective level of tax within the EU, with the aim to decide on the issue of the mandate of the Code of Conduct before the end of the Presidency's term.

9. The HLWP discussed the governance, transparency and working methods of the Code Group on the basis of draft Council conclusions on 1 and 23 February but a complete agreement could not be found. In the light of the discussion held in the HLWP and subsequent informal contacts, the Presidency presented to COREPER a revised version of the Conclusions which were approved by all Member States.

10. Against this background, the Council is invited to adopt the draft conclusions as set out in the Annex as an A point.

<u>**ANNEX**</u>

(Draft) Council Conclusions on the future of the Code of Conduct

"The Council:

1. RECALLS its determination to combat tax fraud, tax evasion and aggressive tax planning at EU and global level;

2. RECALLS the adoption by the Council and the representatives of the Governments of the Member States, meeting within the Council, in December 1997 of a resolution on a Code of conduct for business taxation (hereafter "the Code");

3. RECALLS the subsequent establishment in March 1998 of a Code of Conduct Group (hereafter "the Group") to assess the tax measures falling within the scope of the Code and oversee the provision of information on these measures;

4. RECALLS its conclusions adopted on 8 December 2015 on the future of the Code confirming "*that work on the future of the Code of Conduct and its reinforcement should focus on making better use of the existing mandate of the Code; on examining the possibilities and modalities to extend the mandate and to update the criteria and on the possible need to adjust the governance of the Code accordingly*" and inviting "*the Council High Level Working Party on Taxation (HLWP) to conclude on the need to enhance the overall governance, transparency and working methods and to finalise the reform of the Group during the Dutch Presidency*";

5. CONSIDERS that the organisation of the Group and its working methods could be updated in order to increase even more the efficiency of the Group;

6. CONFIRMS that the rules on the appointment of the chair of the Group should remain unchanged and that two vice-chairs should continue to assist the Chair;

7. ENCOURAGES the group to start preparing the election of the Chair with a view to a smooth transition at the next election early 2017;

8. RECALLS the Group to develop guidance on the interpretation of the gateway criterion and its application;

9. INVITES the Group to actively use existing subgroups and to foresee new subgroups where appropriate;

10. DECIDES that a subgroup will deal with the clarification of the third and the fourth criteria of the Code and that another subgroup will deal with dialogues with relevant third countries;

11. INVITES the High Level Working Party on Taxation (HLWP) to reflect on the need to request this latter subgroup at a later stage to deal with issues related to the communication on an external strategy for effective taxation (doc. 5637/16 FISC 8);

12. UNDERLINES the importance of tax measures being notified to the Group by reference to clear and objective criteria as part of the annual standstill and rollback procedure, NOTES that the Code of Conduct Group's 2015 work package includes the development of such guidelines and INVITES the Group to finalise these as soon as possible;

13. CONSIDERS that the decision-making process has to be speeded up by going from the "agreed description" stage to the "assessment" stage, without requiring a new broad consensus decision on this matter, without prejudice that the final assessment by the Group will remain subject to broad consensus;

14. SUPPORTS enhancing the political visibility of the work of the Group by involving more systematically the Council (ECOFIN), in particular when broad consensus on individual measures, on draft guidance or the evaluation of existing guidance cannot be reached, and by having public debates in ECOFIN as appropriate on some general Code of Conduct issues;

15. UNDERLINES the necessity to increase the transparency of the group on past and ongoing work, whilst stressing the importance to ensure that result-orientated cooperation within the Code of Conduct Group can continue in a confidential manner;

16. CALLS FOR having more substantial 6-monthly Group reports to ECOFIN, reflecting the main elements and views, which were discussed under specific items and reporting also on the monitoring concerning (non-) compliance with agreed guidance;

17. INVITES the Group to explore initiatives to further inform the public on the results of its meetings and to report back to ECOFIN on this issue by June 2017;

18. SUPPORTS regular oral reports to ECOFIN of the Chair of the Group, as well as interinstitutional exchange of information, if necessary;

19. EXPRESSES its wish to facilitate the access to information on ongoing and past work in the Group including already public documents, e.g. through a dedicated page on the Council's website and by releasing, to the extent possible, documents related to general guidance notes and to final decisions on individual measures;

20. INVITES the HLWP to review the new governance, transparency and working methods, especially on the efficiency of the decision making process also in relation to the use of the broad consensus rule in 2017; and report on that to the ECOFIN in December 2017;

21. INVITES the HLWP to examine the issue of the revision of the mandate of the Group, with the aim to take a decision on the possibilities and modalities to extend the mandate and to update the criteria by the end of the Netherlands Presidency."